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No. 82-787

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1982

JAMES BATES, GREGORY TAYLOR,
and CHRISTIAN CASTELAW,

Petitioners,

v.

GERALD C. BRUNER,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

# BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

The question presented for review is whether or not a law enforcement officer can be liable under § 1983 when by inaction he fails to perform a statutorily imposed duty.

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## STATEMENT OF THE CASE

Gerald Bruner scuffled with Officer Tinder after he was assaulted by him and then fled.

At both trials below, Bruner testified he was hit on the nose when apprehended by Castelaw and knocked to the ground, but was not totally unconscious. After he was on the ground and after the other police officers arrived was when he remembered being kicked and beaten into unconsciousness, although he does remember rather vaguely being taken to the hospital.

Moments before the beating, Arthur Copeland saw Gerald Bruner and testified that in his opinion Bruner was fine and did not look like Bruner did in the pictures which were taken shortly after Bruner arrived at the hospital.

Dr. Stephen Natelson testified Bruner suffered a serious skull fracture

caused by a severe blow with a blunt object, not as a result of a fall, but most likely Bruner's head was supported by an object or against the ground when the blow was struck. Further, he testified that Bruner most likely would have lost the consciousness after such a blow and it was highly unlikely that he would have been capable of running any distance or thrashing around violently.

All the Defendants at the two trials below denied hitting Bruner and all denied seeing or hearing anyone hit him.

## ARGUMENT

The Respondent in this case is not attempting to circumvent the "personal involvement" requirement by asserting the doctrine of "respondeat superior" as a basis for liability of persons who were

not present at the time of the incidents. Monell v. Department of Social Services, 436 U.S. 568 (1978). Rather, it is the actual involvement as set forth in the case of Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972). Even if the Defendants did not personally participate in the violation of the beating of the Respondent, the Defendants are liable in law for negligently or intentionally failing to protect him from others who did beat him.

Thus, the Seventh Circuit made clear that, in a case where the plaintiff alleges that he was beaten by police officers in violation of his civil rights, the personal involvement requirement is satisfied by a showing that the officers were present and failed to stop such a beating.

A similar result has been reached by other courts, involving both police

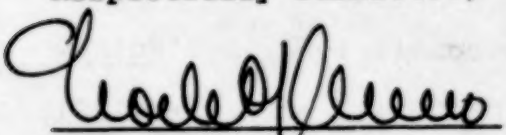
beatings and other constitutional violations. See Simms v. Reiner, 419 F. Supp. 468 (N.D. Ill. 1976)(suit against officer who failed to prevent an illegal warrantless search); Pitrone v. Mercadante, 420 F. Supp. 1387 (E.D. Pa. 1976)(suit against officers who were present at, but did not participate in, an illegal beating); Wood v. Breier, 66 F.R.D. 8 (E.D. Wis. 1975)(suit against police chief for beating done by unknown officers; court, citing Byrd); Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973) (suit against officers who witnessed but did not prevent an illegal search and seizure); Moon v. Winfield, 368 F. Supp. 843 (N.D. Ill. 1973)(suit against a non-supervisory officer who failed to stop a beating administered by his partner); Smith v. Ross, 482 F.2d 33 (6th Cir. 1973); Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972)(recognizing that § 1983 liability

arises from acts of omission as well as commission); and Putnam v. Gerloff, 639 F.2d 415 (8th Cir. 1981)(deputy's failure to intervene in beating administered by Sheriff is sufficient to subject him to liability).

All of the Defendants at the two trials below denied hitting Bruner; all denied seeing or hearing anyone hit him. None of the Defendants came forward at any time to offer any explanation as to how Bruner received such massive and extensive injuries.

There is no conflict in the circuits as to the decision rendered by the Sixth Circuit and therefore, the Respondent respectfully would submit that the Writ of Certiorari should be denied.

Respectfully submitted,



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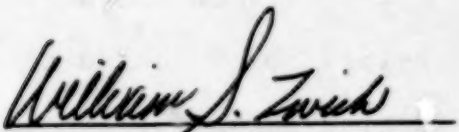

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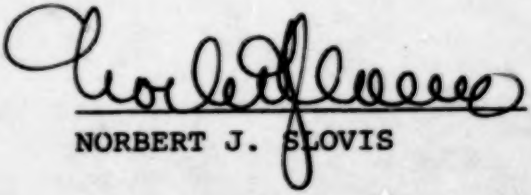
CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and exact copies of this Brief have been served upon Robert H. Watson, Jr., Esquire and John M. Norris, Esquire, attorneys for the Petitioners in this proceeding, by placing same in the U.S. mail with sufficient postage directed to their respective office addresses on this 9th day of December, 1982.



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